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FOR BERNARD OXMAN, U.S. DEL. LOS CONF.

E.O. 11652: XGDS

TAGS: PLOS, IS

SUBJECT: ISRAELI DEMARCHE ON THE STRAITS OF TIRAN AND
THE GULF OF AQABA

1. IMMEDIATE CLEARANCE REQUESTED ON FOLLOWING TEXT ACTION
MEMORANDUM TO SECRETARY AND LETTER TO ALLON.

2. BEGIN TEXT: "PROBLEM -- ON JULY 28, YOU RECEIVED A
LETTER (TAB 2) FROM ALLON, CHARACTERIZING THE LOS REVISED
SINGLE NEGOTIATING TEXT PROVISIONS ON STRAITS SUCH AS TIRAN
AS 'NOT ACCEPTABLE'. ALLON URGES YOU TO ENSURE THAT THE
NEW LAW OF THE SEA CONVENTION PROVIDES UNIMPEDED TRANSIT
PASSAGE AND OVERFLIGHT THROUGH AND OVER THE STRAITS OF TIRAN
AND THE GULF OF AQABA AND FREE ACCESS FOR ISRAEL TO ANY PART
OF THE GULF. HE ARGUES THAT UNITED STATES ACCEPTANCE OF A
NEW CONVENTION WITHOUT SUCH PROVISIONS WOULD BE REVERSAL OF
THE 'CONSISTENT POSITION OF THE UNITED STATES' AND CONTRARY
TO OUR ASSURANCES IN PARAGRAPH 14 OF THE SINAI II MEMORANDUM
OF UNDERSTANDING OF SEPTEMBER 1, 1975, AND EARLIER ASSURANCE
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"BACKGROUND/ANALYSIS -- THE ISRAELIS HAVE RAISED
PROBLEM WITH US BEFORE AT VARIOUS LEVELS INCLUDING
ALLON'S. OUR CONSISTENT POSITION, AT LEAST SINCE THE
1974 CARACAS SESSION OF THE LOS CONFERENCE, HAS BEEN

THAT THERE WAS NO WAY TO PROVIDE IN THE LOS CONTEXT FOR THE LEGAL REGIME SOUGHT BY THE ISRAELIS FOR TIRAN AND AQABA, THAT THE ISRAELIS WOULD HAVE A BETTER OPPORTUNITY TO SECURE AN IMPROVED REGIME FOR THESE WATERS IN A MIDDLE EAST NEGOTIATION, AND THAT THE INSISTENCE ON TREATING TIRAN IN THE SAME MANNER AS SUCH STRAITS AS GIBRALTAR AND BAB EL MANDEB WOULD ONLY SERVE TO DESTROY OUR CHANCES OF PROTECTING OUR VITAL EXISTING RIGHTS OF OVERFLIGHT AND SUBMERGED TRANSIT OF THESE STRAITS FROM THE EFFECTS OF RECOGNITION OF A TWELVE-MILE TERRITORIAL SEA.

"THE ISRAELIS SHOULD ALSO BE AWARE THAT WE CONSIDER TIRAN, AS A .ARROW STRAIT PRESENTLY OVERLAPPED BY THREE-MILE TERRITORIAL SEAS, TO BE UNDER AN INNOCENT PASSAGE REGIME--NON-SUSPENDABLE INNOCENT PASSAGE UNDER THE 1958 TERRITORIAL SEA CONVENTION--A REGIME WHICH DOES NOT PROVIDE FOR OVERFLIGHT OR SUBMERGED TRANSIT, UNLIKE THE RULES CURRENTLY OBTAINING FOR GIBRALTAR AND BAB EL MANDEB. THE ARABS THUS FAR HAVE REFUSED TO RECOGNIZE EVEN NON-SUSPENDABLE INNOCENT PASSAGE AS APPLICABLE TO TIRAN. FAILURE TO PROVIDE AT ALL IN THE NEW LOS CONVENTION FOR STRAITS SUCH AS TIRAN WOULD NOT PREJUDICE THE PRESENT LEGAL PICTURE. ON THE OTHER HAND THE POSSIBLE FUTURE ARAB ACCEPTANCE IN A NEW CONVENTION OF NON-SUSPENDABLE INNOCENT PASSAGE FOR SUCH STRAITS WOULD BE A CONSIDERABLE BENEFIT.

"THE ONLY RELATIVELY NEW ELEMENT IN THE ISRAELI APPROACH TO THE TIRAN SITUATION IS THE TEXT OF PARAGRAPH 14 OF THE SEPTEMBER 15, 1975 MEMORANDUM (TAB 3). HOWEVER, NEITHER IT NOR OUR EARLIER ASSURANCES ON STRAITS AND WATERWAYS PROMISED THE REGIME FOR TIRAN WHICH ISRAEL NOW DEMANDS.

"OUR ASSURANCES ON TIRAN AND AQABA SINCE 1957 HAVE BEEN MADE WITH A CAREFUL EYE TO THE STATE OF INTERNATIONAL LAW. THE 1957 ASSURANCES PROVIDED FOR A RIGHT OF "FREE AND INNOCENT
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CENT" PASSAGE FOR TIRAN, A FORMULATION WHICH, ESSENTIALLY, MEANS INNOCENT PASSAGE AND DOES NOT INCLUDE OVERFLIGHT OR SUBMERGED PASSAGE. IN 1974, WE PROVIDED ISRAEL ASSURANCES ONLY WITH REGARD TO BAB EL MANDEB, IN TERMS OF "FREE AND INNOCENT" PASSAGE. OUR 1975 ASSURANCES WERE NOT INTENDED TO AND DO NOT, IN OUR VIEW, COVER TIRAN.

"THERE ARE, HOWEVER, SOME AMBIGUITIES IN THE 1975 TEXT. IT STATES THAT, 'IN ACCORDANCE WITH THE PRINCIPLE OF FREEDOM OF NAVIGATION ON THE HIGH SEAS AND FREE AND UNIMPEDED PASSAGE THROUGH AND OVER STRAITS CONNECTING INTERNATIONAL WATERS, THE UNITED STATES REGARDS THE STRAITS OF BAB EL MANDEB AND THE STRAIT OF GIBRALTAR AS INTERNATIONAL WATERWAYS.' ISRAEL, POINTING OUT THAT THE STRAITS OF TIRAN

ALSO CONNECT INTERNATIONAL WATERS, ASSERTS THAT WE HAVE 'FORMALLY RECOGNIZED' THE PRINCIPLE OF FREE AND UNIMPEDED TRANSIT THROUGH AND OVER TIRAN.

"WE, HOWEVER, DO NOT BELIEVE THAT WE WERE RECOGNIZING SUCH A REGIME FOR TIRAN. RAHTER, WE WERE FRAMING A STATEMENT CONSISTENT WITH THE LAW OF THE SEA NEGOTIATIONS IN WHICH WE ARE SEEKING TO PRESERVE CERTAIN ESSENTIALS OF OUR EXISTING LEGAL RIGHT TO FREEDOM OF NAVIGATION IN THE HIGH SEAS (PARTICULARLY OVERFLIGHT AND SUBMERGED TRANSIT RIGHTS), IN VITAL STRAITS LIKE GIBRALTAR AND BAB EL MANDEB. THESE STRAITS CONNECT TWO PARTS OF THE HIGH SEAS AND ARE SO WIDE THAT, UNDER THE PRESENT THREE-MILE LIMIT, THEY CAN NOW BE TRAVERSED WITHOUT LEAVING THE HIGH SEAS AND ENTERING TERRITORIAL WATERS. PRESENTLY, FOR NARROWER STRAITS, LIKE TIRAN, WHICH CANNOT BE TRAVERSED WITHOUT ENTERING TERRITORIAL WATERS, THE LAW PROVIDES FOR NON-SUSPENDABLE INNOCENT PASSAGE, A MORE RESTRICTIVE REGIME. AS A CONDITION FOR AGREEING TO AN EXTENSION OF THE TERRITORIAL SEA LIMIT TO TWELVE MILES, WHICH WILL PUT VITAL STRAITS OF THE BROADER SORT INTO THE NARROWER STRAITS SITUATION WITH REGARD TO THE TERRITORIAL SEA, WE ARE INSISTING ON THE GENERAL ACCEPTANCE OF A PRINCIPLE OF FREE AND UNIMPEDED (AS OPPOSED TO INNOCENT) PASSAGE FOR STRAITS BETWEEN TWO PARTS OF THE HIGH SEAS. IT IS NOT EXPECTED TO APPLY TO TIRAN BECAUSE UNDER A TWELVE-MILE LIMIT, TIRAN WOULD BE ENTIRELY TERRITORIAL WATERS AND,

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IN OUR VIEW, NOT HIGH SEAS. (WE USE "HIGH SEAS" INTERCHANGEABLY WITH "INTERNATIONAL WATERS" ALTHOUGH ISRAEL MAY ATTRIBUTE SOME SPECIAL MEANING TO THE LATTER TERM.) THUS, IN THE 1975 TEXT WE ASSERTED A PRINCIPLE ACCORDING TO WHICH THE STRAITS OF GIBRALTAR AND BAB EL MANDEB, NOW UNDER A REGIME OF HIGH SEAS FREEDOM MUST BE KEPT UNDER A REGIME OF, AT MINIMUM, FREE AND UNIMPEDED PASSAGE AND OVERFLIGHT, AND WE CAREFULLY AVOIDED ASSERTING THAT WE CONSIDER THIS REGIME APPLICABLE TO TIRAN, WHICH IS PRESENTLY UNDER MORE RESTRICTIVE RULES. THIS STATEMENT CONSTITUTED AN INTEGRAL WHOLE AND ONE CANNOT PROPERLY SEPARATE OUT ONE PART FROM IT AS FORMAL RECOGNITION OF A PRESENTLY APPLICABLE PRINCIPLE OF FREE AND UNIMPEDED PASSAGE FOR ALL STRAITS CONNECTING WHAT NOW CONSTITUTE INTERNATIONAL WATERS. THE USE OF THE SINGULAR, "PRINCIPLE", IN THE 1975 TEXT IS INCONSISTENT WITH AN ATTEMPT TO DIVIDE THE SENTENCE INTO SEPARABLE PRINCIPLES.

"ANOTHER POSSIBLE AMBIGUITY IS IN THE 1975 TEXTS' EXPRESSION OF SUPPORT FOR ISRAEL'S RIGHT TO FREE AND UNIMPEDED PASSAGE THROUGH AND FREEDOM OF FLIGHTS OVER "SUCH STRAITS". ISRAEL MIGHT WISH TO ARGUE THAT "SUCH STRAITS" HAS AS ITS ANTECEDENT "STRAITS CONNECTING INTERNATIONAL WATERS".

HOWEVER, THE IMMEDIATELY ANTECEDENT REFERENCE TO STRAITS IS "THE STRAITS OF BAB EL MANDEB AND THE STRAIT OF GIBRALTAR". THUS, "SUCH STRAITS" REFERS TO THOSE TWO SPECIFIC STRAITS OR, AT MOST, SIMILAR STRAITS, I.E., STRAITS WHICH NOT ONLY CONNECT TWO PARTS OF THE HIGH SEAS BUT ARE SO BROAD THAT, UNDER THE THREE-MILE LIMIT, THEY CAN BE TRAVERSED WITHOUT LEAVING THE HIGH SEAS.

"THIS READING IS NOT ONLY SUPPORTED BY OUR INTERNAL COMMUNICATIONS DURING THE NEGOTIATIONS BUT IS ALSO BORNE OUT BY THE NEGOTIATING HISTORY. THE ISRAELIS FAVORED A TEXT WHICH WOULD HAVE ASSURED SUPPORT FOR FREE AND UNIMPEDED PASSAGE THROUGH INTERNATIONAL WATERWAYS, "INTER ALIA, THE STRAITS OF BAB EL MANDEB" AND OVERFLIGHT OF THE RED SEA "AND ITS APPROACHES". OUR COUNTERPROPOSAL, WHICH WAS ESSENTIALLY THE TEXT ADOPTED, WAS CRITICIZED BY THE ISRAELI NEGOTIATOR (ROSENNE) AS INCONSISTENT WITH THE DULLES ASSUR-
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ANCES SINCE IT WOULD NOT PROVIDE FOR OVERFLIGHT OF TIRAN. MONROE LEIGH POINTED OUT THAT THE DULLES ASSURANCES DID NOT PROVIDE FOR OVERFLIGHT OF TIRAN. THUS, THE ISRAELIS WERE WELL AWARE THAT THE TEXT FINALLY ADOPTED WAS NOT INTENDED TO BEAR THE MEANING THEY NOW READ INTO IT.

"ALLON IS SIMPLY WRONG IN ARGUING THAT OUR FAILURE TO INSIST IN THE LOS CONFERENCE ON FREE AND UNIMPEDED PASSAGE THROUGH AND OVER TIRAN AND AQABA WOULD BE A REFUSAL OF CONSISTENT UNITED STATES POSITIONS. THE ISRAELI INTERPRETATION OF THE 1975 ASSURANCES WOULD REPRESENT THE REVERSAL OF CONSISTENT U.S. POSITIONS DEALING WITH TIRAN IN TERMS OF INNOCENT PASSAGE. MORE TO THE POINT, IT WOULD BE A REVERSAL WHICH WOULD BE UNMANAGEABLE IN THE LOS CONFERENCE. IT IS IMPORTANT THAT ISRAEL BEGIN TO ACCEPT A REALISTIC OUTCOME FOR THIS NEGOTIATION.

"RECOMMENDATION -- THAT YOU SIGN THE LETTER AT TAB 1, INFORMING ALLON OF OUR VIEWS ON THE LAW OF THE SEA ISSUES HE RAISES AND CORRECTING HIS READING OF THE ESTABLISHED UNITED STATES POSITION." END OF ACTION MEMO TO SECRETARY.

3. TEXT OF LETTER TO ALLON IS AS FOLLOWS: "I VERY MUCH APPRECIATE YOUR CONCERN REGARDING THE INTERNATIONAL REGIME FOR STRAITS AND-WATERSOUSE" FOR HNTEYHATTONTL NSUIGATION. WHILE WE ARE SEEKING TO ENSURE THAT-THE TEXT-RESULTING FROM THE LAW OF THE SEA CONFERENCE CONTAINS THE MOST ADVANTAGEOUS REGIME ACHIEVABLE IN A BROADLY ACCEPTED CONVENTION, I REMAIN OF THE VIEW THAT AGREEMENT ON FREE - AS OPPOSED TO INNOCENT - PASSAGE THROUGH AND OVERFLIGHT OF THE STRAITS OF TIRAN IS SIMPLY NOT POSSIBLE IN THE LOS CONFERENCE; THAT IT WOULD BE UNWISE AT THIS STAGE OF THE

LOS NEGOTIATIONS TO PRECIPITATE A CONFRONTATION ON THIS ISSUE WITH ARAB STATES AND THAT A MIDDLE EAST NEGOTIATION WOULD MORE LIKELY HOLD PROMISE AND PROVIDE LEVERAGE FOR AN IMPROVED REGIME IN THE STRAITS OF TIRAN.

"OUR MINIMUM REQUIREMENT REGARDING TIRAN IN THE LOS CONFERENCE MUST BE THAT THE CONFERENCE NOT PREJUDICE THE TIRAN SITUATION. UNDER THE EXISTING 1958 TERRITORIAL SEA
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CONVENTION, AS A STRAIT OVERLAPPED BY TERRITORIAL WATERS, TIRAN IS UNDER AN INNOCENT PASSAGE REGIME, WHICH ALLOWS NEITHER OVERFLIGHT NOR SUBMERGED NAVIGATION. CARRYOVER OF THAT REGIME INTO THE NEW CONVENTION, OR SILENCE ON SUCH STRAITS IN THE NEW CONVENTION, WOULD NOT CONSTITUTE PREJUDICE. BEYOND THAT, THE PRESENT NEGOTIATING TEXT CONTAINS SOME SIGNIFICANT POTENTIAL IMPROVEMENTS FOR TIRAN IN NEW PROVISIONS DETAILING THE MEANING OF AND PROHIBITING DISCRIMINATION WITH RESPECT TO INNOCENT PASSAGE. THE TEXT ALSO CARRIES OVER THE 1958 CONVENTION'S PROVISION THAT INNOCENT PASSAGE THROUGH SUCH STRAITS IS NON-SUSPENDABLE. IT MAY PROVE POSSIBLE IN THE LOS CONFERENCE TO RETAIN THE NEW PROVISIONS AS WELL AS GAIN ACCEPTANCE BY SOME ARABS OF THE NON-SUSPENDABILITY RULE OF THE 1958 CONVENTION, WHICH THEY HAVE HERETOFORE RESISTED.

"IT REMAINS OF THE UTMOST IMPORTANCE FOR THE MAINTENANCE OF WORLD PEACE AND SECURITY THAT WE PRESERVE FREE PASSAGE THROUGH AND OVER THE STRAITS OF GIBRALTAR AND BAB EL MANDEB, AS WELL AS OTHER HIGH SEAS STRAITS WHICH WOULD BE OVERLAPPED BY TERRITORIAL SEAS UNDER A TWELVE-MILE LIMIT. THIS NOW APPEARS TO BE POSSIBLE. EITHER GIVING UP OVERFLIGHT AND SUBMERGED TRANSIT OF SUCH STRAITS OR SEEKING TO CONTINUE THEM AFTER THE CONCLUSION OF A MULTILATERAL CONVENTION BARRING THEM WOULD BE COSTLY. IT WOULD BE A GRIEVOUS MISTAKE TO JEOPARDIZE THE ACHIEVEMENT OF IMPORTANT OBJECTIVES IN THE LAW OF THE SEA CONFERENCE BY HOLDING OUT FOR AGREEMENTS WHICH ARE IMPOSSIBLE TO REACH IN THAT CONTEXT.

"THIS POSITION IS, IN MY VIEW, ENTIRELY CONSISTENT WITH THE UNDERSTANDINGS BETWEEN OUR TWO COUNTRIES. THE 1957 ASSURANCES PROVIDE FOR ESSENTIALLY INNOCENT PASSAGE THROUGH TIRAN AND AQABA. THE 1974 ASSURANCES, SILENT ON TIRAN AND AQABA, PROVIDE THE SAME FOR BAB EL MANDEB. THE 1975 ASSURANCES, ALSO SILENT ON TIRAN AND AQABA, PROVIDE FOR FREE AND UNIMPEDED PASSAGE THROUGH AND OVER THE STRAITS OF GIBRALTAR AND BAB EL MANDEB AND OVERFLIGHT OF THE RED SEA AND SUCH STRAITS.

"THE 1975 ASSURANCES DID NOT FORMALLY RECOGNIZE AN

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EXISTING LEGAL PRINCIPLE OF FREE AND UNIMPEDED PASSAGE THROUGH AND OVER STRAITS SUCH AS TIRAN. RATHER, ITS FIRST SENTENCE, FRAMED WITH REFERENCE TO THE LAW OF THE SEA CONFERENCE, STATED A SINGLE PRINCIPLE, COMBINING IDEAS OF THE EXISTING PRINCIPLE FREEDOM OF NAVIGATION ON THE HIGH SEAS, WITH OUR HOPED FOR RULE OF FREE AND UNIMPEDED PASSAGE THROUGH STRAITS CONNECTING INTERNATIONAL WATERS, AND USED THIS SINGLE PRINCIPLE TO JUSTIFY A STATEMENT THAT WE REGARD THE STRAITS OF BAB EL MANDEB AND THE STRAIT OF GIBRALTAR AS INTERNATIONAL WATERWAYS. THE ASSURANCES OF SUPPORT GIVEN IN THE 1975 TEXT WERE FOR ISRAEL'S EXISTING RIGHT TO FREE AND UNIMPEDED PASSAGE THROUGH AND OVER 'SUCH STRAITS'. THE REFERENCE TO STRAITS IMMEDIATELY ANTECEDENT TO 'SUCH STRAITS' IS 'THE STRAITS OF BAB EL MANDEB AND THE STRAIT OF GIBRALTAR'. THUS, THE ASSURANCES OF SUPPORT WERE MADE WITH REGARD TO THOSE TWO SPECIFIC STRAITS OR, AT MOST, OTHER STRAITS SIMILAR TO THEM, STRAITS WHICH PRESENTLY CAN BE TRAVERSED WITHOUT LEAVING THE HIGH SEAS. THE TEXT'S PROVISION FOR FREEDOM OF FLIGHTS OVER THE RED SEA AND SUCH STRAITS WAS NOT INTENDED TO PROMISE OVERFLIGHT OF THE STRAIT OF TIRAN OR OF TERRITORIAL SEAS BORDERING THE HIGH SEA PORTIONS OF THE RED SEA AND ITS EXTENSIONS.

"AS I RECALL, AN ISRAELI PROPOSAL TO DRAFT THE 1975 ASSURANCES MORE BROADLY, WITH THE PURPOSE OF IMPLICITLY INCLUDING TIRAN UNDER THE FREE TRANSIT AND OVERFLIGHT REGIME OF GIBRALTAR AND BAB EL MANDEB, WAS NOT ADOPTED.

"I HOPE YOU WILL AGREE THAT OUR EFFORTS SHOULD BE BENT TOWARD ACHIEVING THE MAXIMUM NEGOTIABLE RESULT FROM THE LAW OF THE SEA CONFERENCE. THE UNITED STATES DELEGATION WILL BE ACTIVELY AND CLOSELY CONSULTING WITH YOUR REPRESENTATIVES TO THE LAW OF THE SEA CONFERENCE IN NEW YORK TO THIS END." END TEXT OF LETTER TO ALLON. ROBINSON

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